No. 7650

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. V. SPAUGH and HARRY M. CURRY,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S REPLY BRIEF

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SUBJECT INDEX

CITATIONS AND AUTHORITIES

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Statement of the Case

Appellants J. V. Spaugh and Harry M. Curry were charged with numerous other defendants in Indictment No. 11752-H with the crime of conspiracy in that they and their co-conspirators conspired to forge and counterfeit certain registered Liberty bonds of the United States, and to thereafter utter and publish as true said forged Liberty bonds with the intent to defraud the United States, knowing the said forgeries to be false, forged and counterfeited.

This case was consolidated with a number of other indictments charging substantive offenses referred to in the overt acts of the conspiracy indictment against certain of the conspirators named in the conspiracy indictment, but in no one of the substantive charges

were all of the conspirators, named in the conspiracy indictment, charged with the substantive offense, but no one not included in the conspiracy indictment was named in any of the substantive offenses. This consolidation was made by the court over the objection and exception of the defendant J. V. Spaugh, the defendant J. V. Spaugh being named only in the conspiracy indictment.

All defendants named in the conspiracy indictment either entered pleas of guilty before trial or were tried together except the four aliases named William N. Hawley, Mary E. Martin, Ed Wideman and H. C. Hawley, whose true names at the time of this trial were unknown and they had not been apprehended. In other words, these alias persons were some of those who had appeared at the various banks referred to in the overt acts of the conspiracy indictment and represented themselves as the owners of the bonds and were introduced under the names of the owners of the bonds in question. All but one of these alias persons have since been apprehended and punished, either upon plea of guilty or judgment of conviction.

Since appellant Curry raises only one question upon which he relies for a reversal of this case, and inasmuch as this same question is raised by appellant Spaugh, in order to conserve our time, and the time of the court, we will present our answer to the separate briefs of appellants in one brief.

ARGUMENT

Point One

The first question raised by appellant Spaugh is the consolidation of the conspiracy case with the substantive offenses for trial, over his objection and upon the ground that he was not a defendant in any of the substantive offenses.

We do not question but that it may be the general rule that in order to consolidate separate indictments for trial the defendants in all of the indictments should be the same, but we do not believe this to be an ironclad rule and we further believe that the nature of the charges here consolidated and the nature of proof thereon bring this case out of the general rule and make it an exception thereto.

We wish to point out the overt acts alleged in the conspiracy indictment for the purpose of showing that irrespective of whether or not appellant Spaugh was named in the indictments charging the substantive offenses, yet in establishing proof of the conspiracy and overt acts the government was warranted in establishing sufficient facts upon which to base a conviction on each of the substantive offenses.

Overt Act No. 1 in the conspiracy indictment refers to the same transaction as that charged in Indictment No. 11758-H, (Transcript of Record beg. at p. 54). It is well established that where one overt act named in a conspiracy indictment is proven, then any other overt act in furtherance of the object and purpose of the confederation or conspiracy may be proved, whether alleged in the conspiracy indictment as an overt act or not.

Overt Act No. 1

Overt Act No. 1 charges in substance that on or about the 17th day of July, 1933, Roscoe Clough and W. N. Hawley, whose true name is to the grand jurors unknown, passed at the Farmers & Merchants National Bank of Los Angeles, California, five United States Liberty bonds accurately describing the numbers and denominations of said bonds. Count No. 6 of indictment No. 11758-H (Transcript of Record p. 61) charges these two defendants with the uttering and passing of these same bonds with intent to defraud the United States. Therefore, in proving Overt Act No. 1 in the conspiracy indictment it would be perfectly proper to prove each and every fact necessary to a conviction of defendants Roscoe Clough and W. N. Hawley (alias) in Count No. 6 of said indictment, and after proving one overt act named in the conspiracy indictment the government could properly establish any other overt act in connection with the forging and passing of these bonds and it would be perfectly proper for the government to prove as an overt act each and every fact essential to establish the guilt of Roscoe Clough and W. N. Hawley (alias) in Case No. 11758-H. In other words, if the conspiracy charge were being tried alone we respectfully submit that it would be perfectly proper under Overt Act No. 1 of the indictment to establish the following facts: that the bonds named and mentioned in Overt Act No. 1 were the property of W. N. Hawley; that they were stolen; that they later drifted into the hands of Roscoe Clough and a person who represented himself to be W. N. Hawley; that they thereafter forged the indorse-

ments on said bonds and that the person representing himself to be W. N. Hawley actually signed the indorsements on the bonds and that Roscoe Clough and the person representing himself to be W. N. Hawley passed these bonds at the Farmers & Merchants National Bank of Los Angeles and received money thereon and that they did this with the intent of defrauding the United States government, and if all these facts could be established upon the conspiracy indictment alone as overt acts in furtherance of the object and purpose of the conspiracy, how, or in what way could the defendant Spaugh be prejudiced if the jury were given an opportunity to convict either or both of these participating defendants in this transaction for the substantive offense which they committed in furtherance of this conspiracy.

Overt Act No. 2

The same is true of Overt Act No. 2 (Transcript of Record p. 8) and Indictment No. 11751-H (Transcript of Record p. 29).

Overt Act No. 3

Overt Act No. 3 (Transcript of Record p. 8) refers to the same transaction as covered in Indictment No. 11757-H (Transcript of Record p. 47).

Overt Act No. 4

It is very apparent that Overt Act No. 4 refers to the same transaction as covered in Indictment No. 11755-H (Transcript of Record p. 36).

Overt Act No. 5

The only reason there is not a consolidation of an indictment covered by Overt Act No. 5 (Transcript of Record p. 9) is because the only person charged with this substantive offense was Mack A. Hinson and he entered a plea of guilty to the forgery and it was appellant J. V. Spaugh's good fortune not to have been included as a defendant therein. However, in the trial of the case there was complete proof of this substantive offense and while the evidence is not before the court, the trial court commented thereon in his instructions to the jury which will hereafter be pointed out.

Overt Act No. 6

There exists the same situation in Overt Act No. 6 (Transcript of Record p. 9) as in Overt Act No. 5, except that Fred C. Macomber was the only defendant charged with the substantive offense of forgery and the passing of these bonds and inasmuch as Macomber entered his plea of guilty prior to the trial this indictment is not shown in the transcript.

Overt Act No. 7

Overt Act No. 7 (Transcript of Record p. 9) is covered in indictment No. 11668-H (Transcript of Record p. 23) except that the case had been disposed of as against all defendants except Roscoe Clough prior to the trial herein.

Overt Act No. 8

Overt Act No. 8, (Transcript of Record p. 10) is the same transaction as disclosed in Indictment No. 11756-H. (Transcript of Record p. 42).

Overt Act No. 9

It is very apparent that Overt Act No. 9 (Transcript of Record p. 10) covers the same transaction as disclosed in Overt Act No. 7 (Transcript of Record p. 9).

In establishing proof necessary to warrant a conviction upon each and all of the substantive offenses it would have been necessary to show that the Liberty bonds in question were stolen from the rightful owners; that the indorsements on said bonds were thereafter forged by the defendants named in the substantive offenses and were thereafter uttered and published as true and genuine by the defendants named in the substantive offenses and that this was done by said defendants named in the substantive offenses with guilty knowledge and with intent to defraud the federal government.

Therefore, had the government proceeded to a trial of the conspiracy indictment alone, and in view of the nature of this charge and the nature of the overt acts alleged with reference to these particular bonds, also referred to in the substantive offenses, what proof necessary to establish the guilt of the defendants in the substantive offenses would not have been admissible as proof establishing the conspiracy and the overt acts alleged in the conspiracy indictment? And since the proof in establishing the guilt of the defendants in the conspiracy indictment, if tried alone, would have been the same as it was in the consolidation of these cases, how or in what manner could the defendant J. V. Spaugh have been prejudiced by the consolidation of the substantive offenses with the conspiracy indictment for trial? He could only be convicted upon the conspiracy indict-

ment. The trial court was very careful to instruct the jury upon this point and at page 72 Transcript of Record we find this language in the court's instruction:

> "J. V. Spaugh, one of the defendants in the conspiracy case, is not a defendant in any of the other cases. The sole and only charge against J. V. Spaugh is that he joined in and became a part of a conspiracy as defined in the indictment. Therefore, in coming to your conclusion as regards Mr. Spaugh you must not consider any of the evidence introduced in the other cases charging the other defendants with the crimes as set forth in the other indictments but must confine yourselves entirely to the evidence introduced in support of the conspiracy charge."

Also see page 73 Transcript of Record, covering trial court's instructions with respect to the defendant Spaugh. See also page 74 Transcript of Record wherein the court instructed the jury in part as follows:

> "While in the interests of economy and the conservation of time all of these charges have been tried together, you are to be scrupulously careful to bear in mind that each defendant is entitled to his separate verdict at your hands and you should apply to him in considering his guilt or innocence only such testimony as clearly connects him with the specific offenses charged against him."

Having in mind the fact that the proof upon the conspiracy indictment alone could have been the same as the evidence offered in the consolidated trial, and having in mind the fact that the defendant Spaugh was on trial only for one offense and could have been convicted only

upon the offense charged, even though proof of some of the overt acts might have shown him to be guilty of a substantive offense, and having in mind the last quoted portion of the court's instructions, would it not have been the height of folly to have tried each of these charges separately? We said in the beginning that we believed the facts and circumstances of this case distinguishable from those cases cited by appellant Spaugh in support of his contention.

There is this difference. In the case of *McElroy v. United States*, 164 U. S. 76, at p. 79, the court said:

> "On the face of the indictments there was no connection between the acts charged as committed April 16 and the arson alleged to have been committed two weeks later, on which last occasion the government's testimony, according to the record, showed that the two defendants Charles Hook and Thomas Stufflebeam were not present. The record also discloses that there was no evidence offered tending to show that there had been or was a conspiracy between defendants, or them and other parties, to commit the alleged crimes.
>
> "The several charges in the four indictments were not against the same persons, nor were they for the same act or transaction, nor for two or more acts or transactions connected together; and in our opinion they were not for two or more acts or transactions of the same class of crimes or offenses which might be properly joined, because they were substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times and not provable by the same evidence."

There was a conspiracy charged and shown to exist between these defendants. See Bill of Exceptions, (Transcript of Record p. 63), wherein it is stated that while the evidence was conflicting it "was amply sufficient to support the charges and verdict upon which said J. V. Spaugh and Harry M. Curry were found guilty in said cause No. 11752-H, known as the conspiracy indictment."

There was a close connection between all the acts charged in the conspiracy indictment and in the substantive offenses and they all grew out of the same transaction and the acts in the substantive offenses were in furtherance of the very object and purpose of the conspiracy, the conspirators' ultimate end being to defraud the federal government by the forging, uttering and passing of these stolen Liberty bonds. The transactions in the case at bar were transactions connected together in their commission to such an extent that they all grew out of the same conspiracy and were acts in furtherance thereof.

This case is further distinguishable from the *McElroy* case in that each of the substantive offenses could be proven by a portion of the evidence necessary to establish the charge alleged in the conspiracy indictment. Had one of the defendants named in one of the substantive offenses objected to this consolidation we believe that we might have been facing a different situation because it was not necessary to establish all the facts in any one substantive offense which was necessary to establish in the conspiracy charge, but as we have said before, it is quite apparent that the reverse is true in connection with

the conspiracy charge. Note also the language in the *McElroy* case above cited, at page 81, wherein it is said:

> "While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same *and where the offenses are in nowise parts of the same transaction and must depend upon evidence of a different state of facts as to each or some of them.*" (Italics ours).

The case of *DeLuca et al v. United States*, 299 Fed. 741, is distinguishable from the case at bar in that the conspiracy charge consisted in an agreement to remove opium from a bonded warehouse without payment of the duties thereon, in other words, a conspiracy to defraud the United States of the import duties. The transaction in the other indictment consolidated with the conspiracy indictment for trial was the direct sale of opium which was charged under the Harrison Narcotic Act, and in this connection, in the *DeLuca* case the court said, at page 745:

> "But in the instant case the evidence which proved the conspiracy did not prove the sale. The conspiracy charge was to defraud the United States of the import duties; the transaction in the other case was the sale of opium. One group of men was charged with conspiracy to defraud the United States customs duties, while the other was charged with the sale of a quantity of opium. As the trial progressed, it was argued by the defendant in error

that the sale of the opium to some Chinaman was an overt act in furtherance of the conspiracy. But the conspiracy indictment does allege as overt acts the delivery of the opium, the subject of the sale under the Harrison Act indictment. However, the overt act must be one which tends to further the conspiracy. If not, it is not an overt act, no matter what it may be called. It is the character of the act which is the determining factor and classifies it. It is not the name which it may be called. The object of the conspiracy charge was obtained as soon as the opium was out of the bonded warehouse. It was then that the government's lien on the opium was gone. It had been defrauded, and the conspiracy was ended. No act can further the conspiracy which transpires after the end of the conspiracy. Feder v. United States, 257 Fed. 694, 168 C. C. A. 644, 5 A. L. R. 370; Lonabaugh v. United States, 179 Fed. 476, 103 C. C. A. 56.

"This overt act of sale, as alleged and as pleaded in the indictment, was not in furtherance of the conspiracy to defraud the customs duties. Furthermore, it appears from the record that the sale of 102 pounds of opium was wholly distinct and apart from the conspiracy. The 102 pounds which were sold as proven did not come from the 20 cases. We are satisfied that the two crimes were wholly distinct from each other."

As suggested in connection with the *McElroy* case, the conspiracy's ultimate aim in which Spaugh was involved, was to defraud the federal government and it most certainly was not complete until the bonds had been forged, uttered and passed and money received thereon, and of course by the time of the completion of the con-

spiracy the substantive offenses of forging and uttering and passing were complete.

Without going into detail concerning the other cases cited by appellant upon this point, we think it sufficient to say that each of them has a similar distinguishing difference as indicated in the cases commented upon. Appellant Spaugh says, in substance, in his brief, at page 21, that the consolidation of these cases "tended to confound" him in his defense and prejudice him in his challenges and distracted the attention of the jury. Again may we ask the question, since all of this evidence could have very properly been offered in the conspiracy charge, how could defendant Spaugh either be disturbed or prejudiced in any way by the consolidation? Unfortunately appellant has not seen fit to present this honorable court with the evidence offered in the trial of this case but has been content to rely upon the statement in his Bill of Exceptions (Transcript of Record p. 63) that it "was amply sufficient to support the charges and verdict upon which J. V. Spaugh and Harry M. Curry were found guilty in said case No. 11752-H, known as the conspiracy indictment." Had there been one bit of evidence offered in the consolidated trial of these indictments that would not have been admissible in the trial if the conspiracy charge had been tried alone, we have every reason to believe that the able counsel of appellant Spaugh would have very forcibly called this to the attention of this honorable court.

Following the above-mentioned assertion on page 21 of appellant Spaugh's brief, is a quotation from the court's comment on the evidence which sheds some light

upon the nature of some of the evidence offered. (Spaugh Brief, pp. 22, 23 and 24). And then counsel for appellant says:

> "The foregoing excerpts, together with other statements of fact made by the court in its instructions, were based upon a mass of evidence which distracted the attention of the jury from appellant's defense."

But counsel does not for a moment contend that this "mass of evidence" was immaterial to the issues involved in the conspiracy case. We respectfully submit that the only thing that tended to disturb or confound or prejudice the defendant J. V. Spaugh was the evidence which the Bill of Exceptions describes as "amply sufficient" to convict him and more particularly the evidence flowing from the proof of Overt Acts Nos. 5 and 6 of the conspiracy indictment. And in this connection we wish to direct the court's attention to the fact that the trial court while not commenting upon all the evidence in the case, did call the jury's attention to the facts and circumstances in connection with the two separate sets of Ed Wideman bonds as described in Overt Acts 4 and 5 of the indictment. See court's instructions, first par. p. 93 Transcript of Record, and also p. 102 Transcript of Record particularly wherein the court, in his instructions, said:

> "In other words, the Ed Wideman bond which is involved as one of the overt acts of the conspiracy charge, is No. 618608, and the three bonds involved in this indictment, No. 11,755, run next in serial order.

"And then you will recall the evidence to the effect that all of the Wideman bonds were stolen at one and the same time.

"These are circumstances which are entitled to consideration in conjunction, of course, with all the evidence as to whether or not there is a connection criminal in its nature and tending to establish the charges not only in indictment No. 11,755, but also in the alleged conspiracy charge."

We submit, therefore, that appellant J. V. Spaugh under the peculiar circumstances of this case could not have been, and was not, prejudiced by a consolidation of the various indictments for trial and since the evidence was "amply sufficient" to warrant a conviction he is in no position to complain.

See also: *McGregor v. United States,* 134 Fed. 187; *Ader v. United States,* 284 Fed. 13.

The question may also here present itself whether or not this honorable court can consider the question of improper consolidation of cases from the standpoint of prejudicial error without the entire record of the evidence before it.

Point Two

The question here urged as a ground for reversal is presented by each of the appellants, J. V. Spaugh and Harry M. Curry, and is the only point on which appellant Curry relies for a reversal.

This question grew out of the proceedings before the trial court as disclosed in the Transcript of Record (pp. 113 to 126 incl.), the particular point raised being that

the court inquired of the jury as to their numerical division with respect to the cases on which they were still balloting.

In asking this Honorable Court to uphold the ruling of the trial court we are not unmindful of the decisions of the Supreme Court and Circuit Courts cited by appellants. One of the earliest cases cited by appellants is *Burton v. United States,* 196 U. S. 283, where the court, at pages 307 and 308, condemned the practice of the trial court in inquiring of a jury when brought into court because unable to agree how the jury was divided. So far as we are able to determine this question had not been raised on appeal, neither was the case reversed upon this ground. The court in closing its remark upon this subject, at page 308, said:

> "Cases may easily be imagined where a practice of this kind might lead to improper influences, and for this reason it ought not to obtain."

By this language the court infers that there might be cases and circumstances where such an inquiry would not prejudice the rights of a defendant. Also it should not be overlooked that the court was speaking about a jury which was "unable to agree." (See last paragraph of page 307).

After the decision in the *Burton* case there seemed to be a difference of opinion among the Circuit Courts as to whether or not a non-compliance with this rule was reversible error but this Circuit supported the view that the practice while improper was not necessarily prejudicial error until after the decision of the Supreme Court in the *Brasfield* case, 272 U. S. 448, and there-

after in the case of *Jordan v. United States,* 22 F. (2d) 966, the majority opinion of the court following the decision in the *Brasfield* case, Justice Gilbert dissenting.

While the decision of the Supreme Court in the *Brasfield* case, supra, at page 450 says:

> "We deem it essential to the fair and impartial conduct of the trial, that the inquiry itself should be regarded as ground for reversal,"

the Supreme Court gave its reasons for this general statement, where it said:

> "Its effect upon a divided jury will *often depend upon circumstances* which cannot properly be known to the trial judge or to the appellate courts and may *vary widely* in different situations, but in general its tendency is coercive. It can *rarely be resorted to* without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded." (Italics ours.)

We therefore believe and respectfully submit that the Supreme Court in assigning its reasons for the general statement above quoted, recognized that such an inquiry could be made by the trial court in some instances, at least, without bringing to bear improper influences upon the jury. Otherwise it would not have said "it can rarely be resorted to."

We are very firmly of the conviction that the inquiry of the trial judge complained of resulted neither in coercion nor intimidation of the jury in any way whatso-

ever. Neither do we believe that it had the slightest bearing or influence upon the jury in arriving at their verdict, and therefore in no way prejudiced the rights of the defendants here appealing.

We respectfully submit that the record above cited is one of those rare occasions recognized by the Supreme Court in the *Brasfield* case and that there is abundance of support in the record to show conclusively that it in no wise affected the jury in their deliberations. In support of this contention we direct this honorable court's attention to the following:

First, that while the jury had been out considerable time before they were called in by the court, the fact should not be overlooked that they had accomplished a great deal, as indicated by the Foreman of the jury. (Transcript of Record, p. 119.) Ballots had been taken separately as to each defendant and it is to be assumed that in accordance with the court's instructions upon each count against each defendant separately, and it will be noted that at the time the jury was called in by the court on Monday, January 29, 1934, at twelve o'clock noon, the jury had arrived at a verdict upon the conspiracy count against the defendants Roscoe Clough and Jack Malowitz. (Transcript of Record, p. 126.) They had also balloted and arrived at a verdict upon each and every count against both Malowitz and Clough, and it will be observed from an examination of the indictments that there were a total of 28 counts against Clough and 10 against Malowitz. While the fact is disclosed from the questioning by the court of the Foreman of the jury, that they had arrived at a verdict upon all counts as

against Clough and Malowitz, the nature of those verdicts or the date of same is not disclosed by the record except in the conspiracy indictment (Transcript of Record, p. 126), and in case No. 11,755-H (Transcript of Record, pp. 127 and 128). The verdicts in the conspiracy case and the verdict in case No. 11,755-H against Roscoe Clough were dated January 27, 1934, and the verdict as to Malowitz was dated January 28, 1934, which is a strong indication that they were engaged both Saturday and Sunday in determining the guilt or innocence of these two defendants. We point this out to the court as refuting any intimation that the jury was hopelessly deadlocked awaiting a time when the court would discharge them. On the contrary, they had been busily engaged, having arrived upon 38 separate verdicts as against the defendants Clough and Malowitz.

Second, we also wish to call this honorable court's attention to the fact that when the court asked the bailiff to bring the jury in to the court room on January 29, 1934, at the hour of twelve o'clock noon, the jury sent word back to the court, through the bailiff, that they desired to take another vote before returning into the court room, which request was granted and the jury was not brought into court until 12:15 P. M. (Transcript of Record, p. 113.) This certainly does not picture a jury who were unable to agree, asking to be relieved because of divided opinion. We submit that it is reasonable to assume from the facts disclosed in the record that the jury was busily engaged from the time they retired to deliberate, at 1:43 P. M. Saturday and through Sunday, determining the guilt or innocence of

the defendants Clough and Malowitz upon the 38 counts above mentioned, and that their deliberations as to the appealing defendants began on the morning of January 29th and from all that appears in the record, the ballot which the jury requested to take before coming into court might have been the only ballot taken upon the various counts against the defendant Curry or the one against the defendant Spaugh.

Third, the Foreman of the jury stated in open court that they had not finished balloting in all cases.

> " 'We will ask the foreman to indicate whether the jury has finished balloting.
>
> " 'Foreman Person: Not in all cases.' " (Transcript of Record, p. 114.)

This we believe does not picture a jury who were unable to agree, but on the contrary willing, if not anxious, to continue their deliberations. As a further indication that the jury wished to deliberate further we wish to call the court's attention to the following:

> " 'Now, may we inquire of the Foreman whether there is any question upon which the court can be of any assistance?
>
> " 'Foreman Person: There is a question, your Honor.
>
> " 'The Court: Will you state the question?
>
> " 'Foreman Person: Some of the jurors have just suggested that I should submit the question before reading it.' " (Transcript of Record, p. 117.)

At no place in the record does it appear that the jury was unable to agree and wished to be excused from fur-

ther consideration of the case, but the record discloses, as above indicated, that the jury desired certain information, instructions and guidance from the court which it received, and after it retired for further deliberation, as is indicated by the dates of the verdicts against the defendant Curry it next considered the various counts against him, these verdicts being dated on January 29, 1934, and on the following day, to-wit: January 30, 1934, arrived at a verdict against J. V. Spaugh.

Fourth, it will be noted that the court gave these additional instructions to the jury and inquired as to how they were divided numerically at the noon hour on Monday, January 29, and the jury did not indicate that they had arrived at a verdict in all the cases until about 11:55 A. M. on Tuesday, January 30. We think it is reasonable to assume that the jury worked on the cases and counts as against the defendant Curry on Monday afternoon, after retiring from the court room, and that they very probably deliberated upon the Spaugh case the following Tuesday morning and before coming into court with verdicts. As to the appellant Curry, the record discloses that they stood eleven to one as against the defendant Curry in the conspiracy case and as to each count in cases No. 11,755-H and 11,757-H. (Transcript of Record, p. 121.) Yet, notwithstanding this fact and notwithstanding the instruction and inquiry by the court as to how the jury stood, the jury, after deliberating further, acquitted Curry in four counts in case No. 11,755 and convicted him on five counts in case No. 11,757, and in the conspiracy charge. Taking into consideration the fact that the jury stood eleven to one

upon all counts against the defendant Curry (Transcript of Record, p. 121) and taking also into consideration the fact that after the court made its inquiry, they acquitted the appellant Curry on all counts in case No. 11,755, and convicted him in the other two, we believe conclusively establishes the fact that the jury was in no way influenced by the conduct of the trial court complained of, but rather acted upon their own good judgment and honest convictions.

If the inquiry and conduct of the court complained of in any way influenced the jury or any member thereof to the prejudice of the defendant Spaugh, it was a long time taking effect, for as pointed out heretofore, the jury deliberated for almost twenty-four hours after the inquiry by the court before arriving at a verdict against J. V. Spaugh, and during this time at no time indicated to the court that they could not agree or that they desired to be discharged. These facts taken together with the statement in the Bill of Exceptions prepared by counsel for appellants, that the evidence was "amply sufficient" to support the verdict of guilty upon each of these charges, we believe clearly demonstrates that the jury acted upon their own good judgment rather than being coerced and intimidated into arriving at a verdict of guilty by the actions and conduct of the court complained of.

We further submit that it is not improper to assume that men called for jury duty in federal court are men of high character; men of intelligence and will power; men not easily coerced or persuaded into rendering a verdict in a case which they feel is improper either under

the law or the evidence. We feel that this presumption should prevail, especially in view of the statement in the Bill of Exceptions that the evidence offered in the cases was "amply sufficient" to warrant the verdicts rendered. Courts are not authorized to reverse a case upon mere technical errors or exceptions which do not affect the substantial rights of the parties.

See 28 *U. S. C. A.*, Sec. 391.

Such inquiries as here made by the court frequently occur in criminal trials in state courts, and particularly in the State of California. It is not at all uncommon, and very often beneficial, to the trial court in determining in its discretion whether or not further deliberation of a jury is advisable. If the jury is evenly divided or nearly so the trial court may determine in its discretion that further deliberation would in all probability be useless. On the contrary, if the trial court is advised that the jury is almost unanimous in their agreement upon a verdict, it may determine in its discretion that further deliberation will be the means of the jury reaching a unanimous verdict. This practice has been followed by many of our ablest and fairest judges.

May we again emphasize the fact that the record in this case discloses that we are not dealing with a jury who were unable to agree or who had asked to be relieved from further consideration of the case, but the transcript of the record, above referred to, pictures to us a jury who request permission to take another ballot after the court had called for them, and whose only request after coming into court was for further instruc-

tions and guidance from the court. Had the jury believed at the time that they were unable to agree, we believe they would have so expressed themselves, and the mere fact that they asked for further instructions strongly indicates that they wished to deliberate further, and the fact that they remained in the jury room an additional twenty-four hours, after coming into court on Monday, January 29, is a strong indication that they were deliberating upon the issues presented to them. Had the action of the court here complained of, had a coercive effect upon any member of this jury it would have shown its effect within less than twenty-four hours, and especially in view of the fact that the jury stood eleven to one as to one defendant and ten to two as to the other at the time the inquiry of the court was made.

As pointed out above, error of the trial court, in order to be grounds for reversal, must be error that affects the substantial rights of the defendants, and in determining whether or not an error made by a trial court in a given case, be prejudicial, or a mere technical error, it is necessary to look to the record in the case. The language of the Supreme Court in the *Brasfield* case, supra, wherein it said, "We deem it essential to the fair and impartial conduct of *the* trial, that *the* inquiry itself should be regarded as ground for reversal," (italics ours) certainly refers to the trial in question and the particular inquiry in the *Brasfield* case under the circumstances of that case, otherwise we believe it would have used the language of "of a trial" instead of "of the trial," and that it would have used "that such an inquiry" instead of "that the inquiry," for as pointed

out in its reasoning, "it can rarely be resorted to without bringing to bear in some degree, serious although not measurable, an improper influence upon the jury."

A record disclosing the fact that the verdict of the jury was arrived at upon "ample evidence" after long and careful deliberation, without the jury at any time indicating that they could not agree or desired to be excused, and after they had acquitted one of the defendants upon four counts in one indictment, certainly presents one of the rare cases referred to by the Supreme Court.

Courts in determining whether or not prejudicial error resulted from the trial of a given case must determine it in the light of the facts presented in the particular case.

Cohens v. Virginia, 6 Wheat 264, 399, 5 L. Ed. 257;

See also for comparison of issues in case,
United States v. Holte, 236 U. S. 140, and
Gebarbi et al. v. United States, 287 U. S. 112.

As time goes on there is a growing tendency on the part of our courts, the various state legislatures, and Congress, to get away from technicalities of the law, and at the same time broadening the power of our courts, and where other provision is not made therefor it is ofttimes accomplished by a vote of the people through initiative measures. One recent example of this is the passage of the initiative measure giving to the trial courts of the State of California the power to comment upon the evidence in a jury trial. There were enacted into laws in excess of twenty measures by the 73d Congress broadening the power of the federal courts,

extending jurisdiction to the federal courts over offenses not theretofore recognized as violation of our federal laws, permitting the use of stenographers and interpreters in the grand jury room for useful purposes during the taking of the testimony, extending to the Supreme Court of the United States authority to prescribe rules of practice and procedure from time to time with respect to proceeding in criminal cases after verdict, and we submit that not only has Congress extended the arm of the federal government, including the federal courts, in an effort to suppress crime and to apprehend and prosecute and punish those accused and convicted of crime without regard to technicalities, but that the Supreme Court itself has shown the same general disposition in the rules adopted by it pursuant to the Act of Congress approved March 8, 1934 above referred to, and before this case is finally submitted to this honorable court for decision we believe that there will be other and far reaching laws enacted by Congress along the same line and in the same general direction. Every Act enacted into a law and every decision of the higher courts which has been called to our attention in the past several years, and since the decision in the *Brasfield* case, dealing with the jurisdiction and powers of the trial court, has tended to broaden rather than limit them.

We respectfully submit that the trial court's comment upon the evidence, as disclosed from the record in this case, was far more coercive and persuasive of the jury to render a verdict of guilty than an inquiry as to a jury's numerical division could ever be in any case. Yet our Supreme Court and Circuit Courts have long recog-

nized the right of the court to comment upon the evidence and to even permit the trial court to go so far as to state to the jury, in substance, that in its opinion the defendant is guilty of the offense charged, one of such cases being the case of *Weiderman v. United States,* 10 F. (2d) 745, cited by appellants herein. The people of some of our states have recognized the wisdom of this rule and by initiative measures have extended the same right to their state courts when their legislatures had failed to act thereon. We submit that it is far more coercive and persuasive for a trial court to comment upon the evidence in a manner favorable to the prosecution than it would ever be under any given set of circumstances to ask a jury how they were divided numerically. A trial court in order to function properly and administer justice according to the true intent and meaning of our laws should have well balanced powers.

Point Three

Appellant Spaugh's third and last assignment of error is based upon an instruction given by the court when the jury was called into court on Monday, January 29, at the noon hour. This same charge was given in the case of *Allen v. United States,* 164 U. S. 492, at page 501, and passing upon this point in the Allen case the court said:

> "While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury-room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among

> the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself. There was no error in these instructions."

This same instruction was given in the case of *Burton v. United States*, 196 U. S. 283, at page 305, and in connection therewith, at page 308, the court had the following to say:

> "All that the judge said in regard to the propriety and duty of the jury to fairly and honestly endeavor to agree could have been said without asking for the fact as to the proportion of their division";

Counsel in his brief, at page 40 thereof says:

> "At the time this supplemental charge was given, the jury had been deliberating for nearly forty-eight hours and was standing ten to two as to appellant Spaugh and eleven to one as to appellant Harry M. Curry (Tr., pp. 120, 121)."

While it is true that at the time this instruction was given the jury had been out approximately forty-eight hours, the Transcript of Record, as heretofore pointed out, shows that the jury had been engaged in determining the guilt or innocence of the defendants Clough and Malowitz and had arrived at verdicts as against these

two defendants upon thirty-eight counts. We, therefore, submit that it cannot be logically assumed that they had spent a great deal of this time deliberating upon the guilt or innocence of appellant Spaugh. We, therefore, submit that the giving of this instruction was not prejudicial error.

Conclusion

We respectfully submit that none of the errors complained of, if errors they be, were prejudicial to the rights of the defendants. Of course this court does not have before it the evidence offered in the trial of this case but enough appears from the comment of the court in the giving of the instruction to show that the registered Liberty bonds in question were stolen bonds; that they had reached the hands of these defendants and had been forged and passed and money received thereon, and as disclosed by the Bill of Exceptions the evidence was amply sufficient to warrant the verdicts of the jury. There certainly is enough in the record to disclose the fact that this was a serious and aggravated offense, that the verdicts of the jury had ample support in the evidence, and that the judgment of the trial court should be affirmed.

Respectfully submitted,

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